Supreme Court of the United States,

OCTOBER TERM, 1922.

No. [redacted]110

SOUTHERN POWER COMPANY,

Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO AND CITY OF HIGH POINT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

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The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

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Supreme Court of the United States,

OCTOBER TERM, 1922.

No. 554.

SOUTHERN POWER COMPANY,
Petitioner,

vs.

NORTH CAROLINA PUBLIC SERVICE COMPANY, CITY OF GREENSBORO and CITY OF HIGH POINT,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR PETITIONER.

Statement of the Case.

This suit was instituted by the respondents against the petitioner in the Superior Court of Guilford County, North Carolina, September 2, 1920, and was shortly thereafter removed to the District Court of the United States for the Western District of North Carolina on the ground of diversity of citizenship. Defendant answered in the District Court and the case came on to be heard in that court in June, 1921. The hearing resulted in a decree in favor of the defendant on the

principal issue involved. From that part of the decree the plaintiffs appealed to the United States Circuit Court of Appeals for the Fourth Circuit and in May, 1922, secured a reversal of the same. Defendant thereupon applied for a re-hearing, and such application having been refused, petitioned this court for a writ of certiorari. The writ was allowed in December, 1922, and the case is now here on such writ and the return of the Circuit Court of Appeals thereto.

The Pleadings.

The gravamen of the complaint returned with the writ is that petitioner (defendant below) is a public service corporation engaged in the wholesale generation and distribution of electric current in the State of North Carolina; that in 1909 and 1910 it entered into contracts with the respondent, North Carolina Public Service Co. (hereinafter called the North Carolina Co.), in which it agreed to supply the latter, for the term of ten years, with all the necessary current and power which it might require to operate a street railway system owned by it in the Cities of Greensboro and High Point in the State of North Carolina, and for resale to said cities for municipal purposes and for supplying the inhabitants thereof with current for domestic use; that upon the expiration of said contracts petitioner refused to renew the same or to continue the supply of electric current to the North Carolina Co., claiming that it was under no duty to supply such cur-

rent for resale to said cities or the inhabitants thereof, notwithstanding it was then and for a long time had been, supplying other utility companies with current for resale and had thereby dedicated its property to that particular use.

The complaint further alleges that there is no other source from which respondents can purchase or obtain power and current for their several necessities and for the use of the inhabitants of said cities, and that petitioner already has and now enjoys a monopoly in the ownership of all available hydro-electric sites accessible to Greensboro and High Point. It prays that petitioner may be required to continue the supply of electric current to the North Carolina Co. for the operation of its street railway system and for resale by it to the cities of High Point and Greensboro and the inhabitants thereof.

Petitioner's answer admits that in November, 1908, it entered into a special contract with the High Point Electric Power Co. by which it agreed, for the term of ten years, to supply that company with current of a limited amount and under definite restrictions as to its use, and that in December of the same year it made a similar contract with the Greensboro Electric Company, both of which contracts were thereafter taken over by the North Carolina Co. It also admits that upon the expiration of said contracts it refused to renew the same or to continue furnishing current to the North Carolina Co. except for such period of time

as the latter might require to instal a generating plant of its own.

The answer asserts that petitioner is ready and willing to supply the cities of High Point and Greensboro and the inhabitants thereof with eletricity at current rates or at such rates as may be fixed by the Public Service Commission, but denies that it is under any obligation to supply such electricity through the medium of the North Carolina Co. and thus enable the latter to make a profit at the expense of petitioner or of said cities or their inhabitants.

The answer denies that petitioner is engaged in the distribution of electric current at wholesale or that it has dedicated its property to furnishing current to other utility corporations for resale. It admits that in a few instances petitioner has entered into special contracts with other public utility companies to sell them limited quantities of electricity at prices and for periods and upon terms and conditions stated in such special contracts, but asserts that the wholesale distribution of current is not and never has been any part of petitioner's business as a public service corporation, and that, except in the few instances referred to, petitioner has always sold and distributed and still sells and distributes its electric current and power directly to the users and consumers thereof.

The answer denies that petitioner has a monopoly in the ownership of available hydro-electric sites accessible to Greensboro and High Point and that there is no

other available source from which respondents can purchase or obtain power and current for their respective requirements and for the use of the inhabitants of said cities. It asserts that the North Carolina Co. has power under its charter and the laws of North Carolina to develop, construct, lease and operate, water power in that State or elsewhere and to manfacture, generate, distribute and sell electric current for public and private use, all as fully as petitioner may do under its charter and the laws of said State; that said company has frequently represented to petitioner that it proposed to build a hydro-electric plant with which to generate its own supply of electricity and on one occasion exhibited to the representatives of petitioner some of its plans for the construction of such hydro-electric plant, and that had said company used due diligence and shown a proper recognition of its contract obligations to the cities of High Point and Greensboro and the inhabitants thereof, it could have easily put itself in position to fully and adequately serve said cities and their inhabitants by January 1, 1921, the date to which, as matter of grace, petitioner extended the time during which it would supply said company with current.

For further defense the answer sets up:

1. That the North Carolina Co., being a public utility corporation and having power to generate its own electricity, cannot require petitioner to supply it with the same.

2. That the North Carolina Co. is engaged in the sale and distribution of electric current in competition with petitioner and is seeking to compel petitioner to deliver current for the purpose of selling and delivering the same in competition with petitioner to the injury and detriment of petitioner, its property and business.

3. That petitioner generates and acquires electric current for the purpose of selling and distributing the same to the users and consumers thereof in order to make a profit upon such sale and distribution; that if it is compelled to continue to sell and deliver electric current to the North Carolina Co. said company will resell and distribute the same to the users and consumers thereof in competition with petitioner and will deprive the latter of the profit incident to the sale and distribution thereof and will seriously injure and impair the property and business of petitioner and deprive it of the rights, privileges and franchises which it has under the law.

To this answer respondents filed a reply denying all matters and things set forth in the answer inconsistent with and contradictory of the matters and things alleged in the complaint.

The Proofs.

When the case came on to be heard before the District Court respondents moved for judgment upon the pleadings, and this motion having been overruled, sub-

mitted the case for final hearing upon the bill and answer (R., p. 323).

Petitioner thereupon, by leave of the court, introduced evidence in support of the affirmative defenses and counterclaims set up in its answer, calling as its first witness, Mr. W. S. Lee, its Vice President and Chief Engineer.

Mr. Lee testified that electricity, in almost every case, is sold by the Kilowatt; that a Killowatt is 1,000 Watts and is approximately 1 1/3 H. P. (R., p. 92); that during the twelve months ending April 30, 1921, petitioner sold in North Carolina 374,669,534 Kilowatts of electricity (R., p. 93); that in 1920 petitioner supplied the North Carolina Co. at High Point with 6,600,400 Kilowatts and at Greensboro with 8,270,600 Kilowatts (R., p. 94); that petitioner has made contracts with a few public utility companies in which it has agreed to furnish them power for their requirements under terms of contracts defining and fixing the different amounts; that petitioner does not sell power to other public utility companies except under such contracts (R., p. 94) and that said sales constitute a very small part of petitioner's business (R., p. 113).

Mr. Lee further testified that when petitioner undertakes to build a power plant, or add an additional power plant to its system, it estimates, as carefully as it can, just what output of power it will get from that station; that at the same time it undertakes to place contracts for that amount of power somewhere on its system; that

if it does not arrange for the sale of such power the plant will stand idle; that alternating current electricity cannot be stored and a customer must therefore be found to take it up as it is generated or there is an entire loss on that part of the investment which is not generating power (R., p. 93).

The special contracts referred to by the witness were enumerated by him on cross-examination at page 112 and were offered in evidence and constitute defendant's exhibits 37 (p. 255); 38 (Amended by Exhibit 41, pp. 261, 273); 39 (Amended by Exhibit 40, pp. 266, 272), and 42 (Amended by Exhibit 43, pp. 275, 282). The contracts with the predecessors of the North Carolina Co. were offered as defendant's exhibits 1 and 10 (pp. 148, 161). These latter contracts specifically provide that upon the expiration thereof petitioner may enter upon the premises of the consumers and take and carry away any meter, apparatus, appliances, fixtures or other property of petitioner (R., pp. 152, 166).

Mr. Lee further testified that he had negotiations with the representatives of the North Carolina Co. some time before the expiration of the contracts looking to a renewal of the same; that during these negotiations said representatives took the position that they could make their power cheaper by building a steam plant and discussed with him on two or three occasions the question of building such a plant somewhere between Salisbury and Greensboro and supplying all their plants therefrom; that this went on for a while and afterwards said

representatives stated that they would probably build a water power plant on the Yadkin River between Salisbury and Greensboro and transmit power to their plants from that point and that they exhibited to him plans and specifications for the proposed water power (R., pp. 95, 172).

Mr. Lee also testified that petitioner with its affiliated interests has two developments in North Carolina, one at Lookout Shoals of about 33,000 H. P. and one at Bridgewater of about 27,000 H. P., making a total of about 60,000 H. P.; that according to the geological survey and government reports there is undeveloped in the State of North Carolina about 1,095,000 H. P., an estimate which he thinks is low; that the Yadkin River lies between the territory served by North Carolina Public Service Co. and the Catawba River upon which the plants of petitioner are largely located; that the Yadkin River has approximately the same kind of fall as the Catawba and that just as much or more power can be developed on the Yadkin as on the Catawba (R., p. 97), and that petitioner owns no property on the Yadkin (R., p. 125).

Mr. Lee further said that the Roanoke River has two very fine power sites and is very much larger than either the Catawba or the Yadkin and that petitioner's transmission line from the Catawba to Greensboro and High Point is longer than would be required from the Roanoke River (R., p. 98).

He also testified that petitioner is engaged in selling

current for distribution to various municipalities in the State of North Carolina, naming Concord, Monroe, Mooresville, Shelby, Albermarle, Lexington, Newton, Statesville and Morganton (R., pp. 114, 118, 127), and said that petitioner does not retail current in the sense of supplying lighting customers in any incorporated town except Salisbury, North Carolina (R., p. 114); that petitioner sells current to approximately 300 cotton mills in North and South Carolina, about 75% of which are in North Carolina; that the current is sold to these mills for motive power and for lighting incident to the use of the motive power; that practically every cotton mill petitioner drives has its own mill village; that a great number of these mills light their villages from this power and that the contracts provide for the use of the current for that purpose (R., pp. 116-7). He said that most of the mills charge their employes nothing for lighting their houses and he thought none of them do (R., p. 125).

The witness said that the Southern Public Utilities Company was organized in 1913 and, although organized as a separate concern, is affiliated with petitioner (R., p. 121); that the stockholders of the Utilities Company are, to a large extent, stockholders of petitioner and that the general offices of the two companies are in the same building at Charlotte, North Carolina (R., p. 118); that prior to the organization of the Utilities Co. petitioner distributed power locally to some of the towns and had purchased from time to time some of the prop-

erties of other companies that were distributing current locally; that petitioner turned over to the Utilities Company upon its organization the property it had in the towns it was so serving and that since that time the Utilities Co. has distributed electricity locally in those towns, the current for that purpose being supplied by petitioner (R., pp. 121, 122, 110). (These towns are named on page 113 of the Record.)

Mr. Lee further testified that petitioner had not been able to sell any power since the Fall of 1919; that it had a sharp demand for power during the latter part of that year and made a great many contracts about that time; that it thereafter checked up its generation and sales and came to the conclusion that it was not safe to sell any more power and since that time has discontinued selling power to anyone except where perhaps some company had some unused power that it increased; that petitioner has on file applications for probably 25 or 30 thousand H. P. that it cannot make a contract for, and could not serve if it had them with the capacity of its present plant; that it has also 10 or 15 cotton mills whose contracts have expired and that petitioner is now carrying them on a temporary contract subject to cut-off when it has not got the power to run them (R., p. 99). He said that petitioner is in the situation today that it cannot make commitments and yet the North Carolina Co. is increasing its load faster than it ever has in its history and that the first time water goes down petitioner will have to cut off plants with which it has had contracts

that have expired in order to give the North Carolina Co. the power, if it stays on the line (R., p. 101).

Speaking on the subject of competition, Mr. Lee said that petitioner has some customers at High Point, instancing the Pickett Mills and Highland Mills; that it also has two or three rather large customers in the vicinity of Greensboro, naming the Proximity Mills, Revolution Mills and Pomona Mills; that it had an application for power at High Point from a concern named the Melton-Rhodes Company located at its substation there with just a fence between them; that petitioner was compelled to advise the Melton-Rhodes people that it could not supply them as it did not have the power, and that thereupon they made a contract with the North Carolina Co. and are now being supplied by that company (R., p. 123). Mr. Lee was then asked:

> "Q. How does it happen that the N. C. Public Service Company can supply the Melton-Rhodes Company when the Southern Power Company cannot?
>
> A. That is just what has got my entire company very much disturbed about the whole situation. We have a very peculiar phase of it right there. We have a certain amount of power to supply; we have no contract with the N. C. Public Service Co.; they are going on increasing their load faster than ever since we have been serving them. In the meantime we are forced to turn down applications for power from customers all over the system, and this particular point comes right square

back to the limit of High Point. We refused the Melton-Rhodes Company service and our substation is in a stone's throw of their plant. We have been driving the Pickett Mills, which is a few hundred yards the other side of the substation, and we have been forced to refuse our old customer service there, and they would be forced to shut down the Pickett Cotton Mills today if it was not for the depreciation in the cotton mill industry, and these strikes on, and it looks as if our contracts with our customers will have to be curtailed in order to take care of the contracts that the N. C. Public Service Co. is making right along. If that matter was carried on to a conclusion, I do not see where we can get the power and we would have to cut off some of our customers today if it was not for the fact that this curtailment is on.

Q. You have no contract with the N. C. Public Service Co.?

A. We have no contract with the N. C. Public Service Co. and their load is increasing very fast by selling power when we have positively forbidden anybody to sell elsewhere on the system. We cannot pull it.

Q. You will have to cut off your own contract customers?

A. If it stays on.

Q. Did you have application from the Southern Railway Co. to supply them power out at Pomona, some distance from the City limits of Greensboro?

A. Yes, sir.

Q. Were you able to fill that obligation?

A. No, sir; we told them that we did not have the power to supply it over our contracted power" (R., p. 123).

Mr. Lee also testified that at Salisbury both petitioner and the North Carolina Public Service Co. are distributing electric current locally, each having a franchise from the town for that purpose; that the Service Company obtains its current from petitioner; that the matter is in litigation (R., p. 115), and petitioner cannot get the Service Co. off its lines (R., p. 128).

Petitioner next called *G. C. Howard,* in charge of its substation at High Point. Mr. Howard testified that the North Carolina Co. is extending its lines beyond the city limits of High Point to factories in some places in the neighborhood of half a mile away. He named as such factories, Moffitt Underwear Co., Keystone Cabinet Co. and Perley A. Thompson Car Works. He also said the company is extending a line to Oak Hill school building and church about a half mile or more beyond High Point (R., pp. 136-7).

J. W. Matthews, petitioner's Division Superintendent at Greensboro, was also called as a witness. He testified that the North Carolina Co. has extended its lines beyond the limits of Greensboro to the Armour Company, the American Agricultural Chemical Co. and the Swift Company. These are all fertilizer companies. He testified that the North Carolina Public Service

Company also furnishes power to the Southern Railway at its Pomona yards 2½ to 3 miles outside the city limits and that the company has also a lighting line which goes out on the battle ground road about three-quarters of a mile from the city limits; also a lighting line out on the Winston Road 4 or 5 miles (R., pp. 139-140).

Petitioner also offered in evidence certain letters received by it from the High Point Electric Co. in the Autumn of 1908 when the contract with that company was under negotiation. These letters deal with the subject of the dismantling of the electric company's steam plant referred to in Exhibit C annexed to the complaint (R., p. 17), and also with the period of time the contract was to run, the elecric company at first insisting on 20 years, then on 15 years, and finally agreeing to 10 years. The letters are marked Defendant's Exhibits Nos. 2 to 9 (R., pp. 154-160).

Mr. Lee also testified on the subject of the dismantling of the electric company's steam plant. He said that petitioner did not desire it and that he had never intimated any such desire at any time; that the electric company was using a different kind of power from that generated by petitioner and that in order to use petitioner's power it was necessary for the electric company to dismantle its plant (R., pp. 91, 124).

Petitioner also read into the record an excerpt from a report made to the North Carolina Public Service Co. by its engineer at the time it was considering the build-

ing of a generating plant at High Rock on the Yadkin River. The excerpt is as follows:

> "The contracts of the N. C. Public Service Co. are three in number and all expire about 1919. These contracts limit the maximum demand to 3,000 K. W. for Greensboro, 420 for Salisbury, and 1,200 K. W. for High Point. The contracts carry a rate of 1.1¢ per K. W. H. on all current purchased except a portion at 1.35¢ per K. W. at High Point. Under the conditions of these contracts the N. C. Public Service Co. is limited to obtaining of lighting and small power business. Except by special permission they are not allowed to serve large power consumers. On account of the probable electric railway extensions, and the fact that the N. C. Public Service Co. is reaching a point where its ability to take on new business will necessitate a new contract with the Southern Power Co. with a probable rate increase or an enlargement of the N. C. Public Service Co.'s own steam plant makes the High Rock development an interesting proposition, especially so if proper arrangements can be made with the Southern Power Co. to take the output above the requirements of the N. C. Public Service Co. until the Public Service Co. shall need the output" (R., p. 97).

Respondents called no witness in rebuttal. They did, however, offer certain exhibits which may be classified as follows:

1. Letters from representatives of petitioner to North Carolina Public Service Co. or its predecessor,

Greensboro Electric Co., bearing on the development of the electric distributing business at Greensboro (Plff.'s Exhibits A to K, R., pp. 290-295).

2. A prospectus issued by petitioner March 1, 1910, in support of an offer of its first mortgage gold bonds (Plff.'s Exhibit KK., R., p. 297).

3. Map of petitioner's transmission system (Plff.'s Exhibit L, R., p. 300).

4. Form of light and power contracts used by petitioner (Plff.'s Exhibits M and N, R., pp. 301-308).

5. Allegation 15 of complaint in *Salisbury and Spencer Ry. Co. and North Carolina Public Service Co.* vs. *Southern Power Co.*, and petitioner's answer thereto (Plff.'s Exhibit O, R., pp. 313-14).

Judgment of the District Court.

The District Court made specific findings of fact as follows:

1. "That defendant has never dedicated its property to the public use of selling electricity to other public utility companies for resale and distribution by such companies".

2. "That the North Carolina Public Service Co. by its charter, has the right to secure, develop and operate hydro-electric plants and to generate electricity and

sell and distribute it, and that the powers granted the North Carolina Public Service Co. in this respect are the same as those possessed by the Southern Power Co."

3. "That North Carolina Public Service Co. sells and distributes electricity that has been purchased from the defendant in competition with the defendant" (R., p. 318).

The Court thereupon ordered, adjudged and decreed:

"That the complainants have no legal right to require and compel the defendant to sell and deliver electricity to the complainant, North Carolina Public Service Company, for resale and distribution by said North Carolina Public Service Company to said Cities of Greensboro and High Point and their citizens and inhabitants and to the other customers of said North Carolina Public Service Company and that the complainants are not entitled to have the defendant enjoined from discontinuing the sale and delivery of electricity to said North Carolina Public Service Company for such uses and purposes" (R., p. 321).

The Court, however, decided that the North Carolina Co. is entitled to require petitioner to sell and deliver to it electricity for use by it as a motive power in operating its street railway systems in Greensboro and High Point and the vicinities thereof (R., p. 321).

Judgment of the Circuit Court of Appeals.

Majority Opinion.

Circuit Judge Woods filed an opinion (Judge Knapp concurring) in which he held:

That the Southern Power Company by its charter is authorized to buy, sell, operate or lease pole lines, erect poles, string wires thereon or on poles of other individuals or corporations * * * and to use the same either for the transmission of electric current, for delivery to consumers on such lines, or for transmission of current to independent vendors thereof, and to sell or lease to other individuals or corporations the right to string wires on or attach electric wires to any or all poles owned or leased, and to use such lines, both as through lines and for local delivery; that by the law of North Carolina hydro-electric companies are declared to be public service corporations subject to the laws of the State regulating public service corporations and under the control of the Corporation Commission of the State; that petitioner has exercised under State authority the power of eminent domain and has constructed about 1,500 miles of transmission lines and has developed about 60,000 H. P. of hydro-electric current; that exercising this right to carry its lines and power anywhere in the State by condemnation, petitioner has carried them to cities and towns and has made contracts with other public service corporations under its charter

power to use its property for "transmission of current to independent vendors thereof"; that among these independent vendors furnished with current is the Southern Public Utilities Company; that this company is nothing more than an offshoot of petitioner controlled by it and with the same stockholders; that while it is true that petitioner has been serving some towns and their inhabitants and factories in the same way that the North Carolina Public Service Company serves Greensboro and High Point and their inhabitants and factories, it appears by the testimony of Mr. Lee that in these instances it has turned over its property and contracts to Southern Public Utilities Company, which company purchases current from the parent company; that the evidence admits of no other inference than that the policy and aim of the petitioner is to furnish current directly to municipalities only through its own "independent vendor" Southern Public Utilities Company; that this leaves petitioner exercising its corporate power mainly if not entirely for the wholesale manufacture and sale of hydro-electric current; that while it is true that the North Carolina Co. does furnish current to contiguous factories and in this restricted sense may be a competitor of petitioner, it is not a competitor in the general manufacture, sale and distribution of current; that in the business of furnishing light and power to cities and towns and their inhabitants, the real competition of the North Carolina Co. and other independent vendors is not with petitioner exercising its corporate

powers but with Southern Public Utilities Company exercising its separate corporate powers; that while there is high authority for the general proposition of law that one competitor in business cannot demand service of another in promotion of its business, in this instance petitioner has definitely undertaken, entered upon and continued the service of transmitting electric current to independent vendors thereof under the authority of its charter, and for that purpose has exercised the power of eminent domain conferred by the State, and cannot now be heard to say that it owes no public duty with respect to that service, and that it may pick and choose its customers and arbitrarily discriminate among them (R., pp. 331-340).

Dissenting Opinion.

Judge Waddill filed a dissenting opinion in which he observed:

That the case presented is a simple one, viz., whether petitioner can be required, in the absence of a contract, to furnish appellant, North Carolina Public Service Company, a competitor, with power to enable the latter company to sell the same to the Cities of High Point and Greensboro and the citizens of said two cities, in competition with petitioner; that unless the contracts entered into with petitioner by the two companies acquired by the North Carolina Co., both of which have long since expired, or some other act on petitioner's part constitutes a dedication of its right to

sell electricity to the public, and thereby enables the North Carolina Co. and other similar companies to call upon it to furnish power for resale and distribution, in competition with itself, confessedly no such right exists; that, of course, appellee could have so conducted its business as to have dedicated its rights and privileges under its charter, to manufacture and furnish electricity to the public generally, in which event it would not be heard to decline to furnish the same to the North Carolina Co. as one of the public, for resale to the two cities involved here; but that if anything is manifest in this case, as well from the pleadings and proofs as from the findings of the lower court, it is that no such dedication has ever been made or was intended to be made; that on the contrary petitioner has at all times carefully in terms so contracted as to be relieved from the implication of any such folly as it would have been guilty of, had it transferred its vast business interests from its own stockholders for the benefit of the public; that the North Carolina Co. is not one of the general public, in the sense of a consumer; that on the contrary it is a competitor in business as a public service corporation, without the ability to produce electricity for sale, trying to ingraft itself on petitioner, with a view of securing its power, in order that it may deal in and resell the same in competition with the producer; that the equities of the case are clearly with petitioner; that the North Carolina Co. has all to make, and nothing to lose by the success

of the litigation since it is seeking to avail itself of the right to use petitioner's franchise in competition with it; whereas in the case of petitioner the situation is entirely different, in that it secured its charter to do business and is so engaged upon an extended scale, and at great expense, and is dependent upon having secured to it the rights given to it by its charter, to lawfully sell its output to its customers, without let or hindrance on the part of others who have no interest therein except to avail themselves of its rights and privileges and franchises (R., p. 340).

A decree was entered ordering that the decree of the District Court be modified as set forth in the majority opinion and that the cause be remanded to the District Court for further proceedings in accordance with such opinion (R., p. 344).

Specification of Errors Relied on.

Petitioner relies upon the errors specified in its petition for a writ of certiorari as follows:

1. That the Circuit Court of Appeals in effect held and decided that petitioner, a public service corporation, in the absence of a contract, owes to the respondent, North Carolina Public Service Co., a similar public service corporation, the duty of furnishing to it electric current manufactured and generated by petitioner, for resale and distribution to the public by such Service Co. at a profit to it, and in competition with

petitioner, in derogation of petitioner's right to distribute its own product to the public through its own instrumentalities or instrumentalities of its own selection (Pet., p. 12).

2. That the Court held erroneous the finding and judgment of the District Court to the effect that petitioner had never dedicated its property to the supplying of electric current to independent vendors, and found and adjudged, contrary to the evidence, that petitioner had in fact so dedicated its property (Pet., p. 13).

3. That the Court held and decided that respondent, North Carolina Public Service Co., in its capacity as an independent vendor of electricity, is a part of the public to whom petitioner owes the duty of public service in the exercise of its corporate powers (Sup. Br., pp. 24, 25).

4. That the Court held and decided that respondent, North Carolina Public Service Co., is not a competitor of petitioner in the sale and distribution of electricity within the meaning of the rule which exempts a public service corporation from the duty of serving a competitor in the promotion of such competitor's business (Sup. Br., pp. 25, 28).

5. That the Court held and decided that petitioner is shown by the facts appearing in the record to have

definitely undertaken and entered upon the particular service of furnishing electric current to independent vendors, and has thereby dedicated its property to the service of all independent vendors, including the North Carolina Public Service Co. (Sup. Br., pp. 25, 30).

6. That the decision of the Circuit Court of Appeals infringes the constitutional rights of petitioner in that it deprives petitioner of its property without due process of law and also deprives it of its freedom of contract, rights guaranteed to it by the Constitution of the United States (Pet., p. 13).

ARGUMENT.

POINT I.

Petitioner is not engaged in the business of selling and distributing electric current at wholesale. On the contrary, except to a very small extent, it sells and distributes its current direct to the consumers thereof, and in this respect its business and that of the North Carolina Public Service Co. are identical.

The decision of the Circuit Court of Appeals to the effect that petitioner is exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric current and is not, therefore, a competitor of the North Carolina Public Service Co. in the general sale and distribution of current is,

we submit, based upon a misapprehension of the pleadings and proofs.

Paragraph IV of the complaint alleges that petitioner is engaged in the wholesale distribution of current for profit (R., p. 3).

The answer denies this allegation and asserts that while in a few instances petitioner has made special contracts for what may be termed the "wholesale of power" in limited amounts and for limited periods upon the particular terms and conditions set forth in such contracts, the wholesale distribution of current is not and never has been any part of petitioner's business as a public service corporation, and that, except in the few instances referred to, petitioner has always sold and distributed, and still sells and distributes its electric current and power directly to the users and consumers thereof (Ans., par. IV, R., p. 27). No proof was offered by respondents in support of the allegations thus denied.

The Court, as a basis for its conclusion that petitioner is engaged in the wholesale distribution of current and is not in competition with the North Carolina Co., stated that while petitioner has been serving some towns and their inhabitants and factories in the same way that the North Carolina Co. serves Greensboro and High Point and their inhabitants and factories, it appears from the testimony of Mr. Lee that in these instances it has turned over its property and contracts to the Southern Public Utilities Co., which purchases its current from the parent company; that while it is

true that it bid in its own name for the contract to furnish current for the cities of Greensboro and High Point, it seems fair to infer that, in pursuance of its general policy, this contract would have been turned over to the Southern Public Utilities Co.; that at all events the evidence admits of no other inference than that the policy and aim of petitioner is to furnish current directly to municipalities only through its own "independent vendor", the Southern Public Utilities Co.; that this leaves petitioner exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric current; that it is true that the North Carolina Co. does furnish current to contiguous factories, and in that restricted sense may be a competitor of petitioner, but that it is not a competitor in the general manufacture, sale and distribution of current; that in the business of furnishing light and power to the cities and towns, and their inhabitants, the real competition of the North Carolina Co., and other "independent vendors", is not with petitioner exercising its corporate powers, but with Southern Public Utilities Co. exercising its separate corporate powers (R., p. 336).

How greatly the Court misapprehended the proofs on this point will appear from their simple recital. The Southern Public Utilities Co. was organized in 1913. It is not an "independent vendor" and has never been so characterized by petitioner. It is rather, as described in another part of the Court's opinion, an "offshoot" of petitioner, "controlled by it and with the same stock-

holders". Shortly after its organization petitioner turned over to it the business of distributing current locally in certain North Carolina towns which petitioner had therefore carried on, and that business has since been conducted by the Utilities Co. (R., p. 113). No contract appears to have been turned over by petitioner to the Utilities Co. since 1914. Neither does it appear that a single one of the contracts then turned over was for the delivery of current to a municipality for resale in whole or in part to its inhabitants, nor that the Utilities Co. has at any time taken on such a contract.

On the other hand, it appears that petitioner has made and still retains contracts with the towns of Concord, Monroe, Mooresville, Shelby, Albermarle, Lexington, Newton, Statesville and Morganton, under which it is supplying them with current for municipal use and for resale to their inhabitants (R., pp. 114, 118, 127); also that petitioner has contracts for furnishing electricity for power and light with over three hundred cotton mills (R., p. 116), besides contracts of the same character with certain railroads and other business enterprises; that the only current it is supplying at "wholesale" is furnished to three or four utility companies who are distributing it in the towns of Leaksville, Norwood, Hillsboro, and the territory served by the Piedmont Ry. & Elec. Co., and that this current is supplied under special contracts, offered in evidence as Deft. Ex. 37 (p. 255); 38 (p. 261); 41 (p. 273), and 42 (p. 275). It further appears that the total amount

of current sold by petitioner in North Carolina to municipalities for light and power, and to the Southern Public Utilities Co., the North Carolina Public Service Co., and all other public utility companies for resale to municipalities in this State, is approximately 17,000 horse-power out of over 300,000 horse-power generated, contracted and purchased by petitioner, and transmitted over its system. This latter statement is taken not from petitioner's proof but from paragraph VI of the complaint (R., p. 4).

It thus appears that if current were sold by petitioner at "wholesale" to all the agencies mentioned by the Court, which it is not, and if to these sales were added those made to municipalities, which are not mentioned by the Court, the total amount would be less than 6% of petitioner's sales in the State of North Carolina. Obviously, therefore, the conclusion of the Court that petitioner "is exercising its corporate powers mainly, if not entirely, for the wholesale manufacture and sale of hydro-electric power", is erroneous.

And it is equally obvious that the Court erred in its conclusion that in the business of furnishing light and power to cities and towns the real competition of the North Carolina Co. is not with petitioner but with the Southern Public Utilities Co. The activities of the North Carolina Co. are confined to the cities of Salisbury, Greensboro and High Point, and their vicinities. It does not appear that the Southern Public Utilities Co. has ever distributed a single kilowatt of electricity in any of these localities, but it does appear that petitioner

has distributing lines to each of them, and has for a long time been distributing current at retail therein.

In Salisbury petitioner has a franchise (Ex. 11, p. 167), and is supplying a portion of the inhabitants, and the North Carolina Co. is supplying the city and the remainder of the inhabitants, and it is doing this with current taken from petitioner's line (R., p. 115).

In April, 1920, petitioner applied to the city of Greensboro for a franchise to enable it to furnish current to the city and its inhabitants, and its application was defeated, apparently through the propaganda issued and circulated by the North Carolina Public Service Co. (Deft.'s Exs. 32, 33, 34 and 35, R., pp. 246-250).

Both petitioner and the North Carolina Co. are distributing current in considerable quantities in competition with each other throughout the territory surrounding Greensboro, Salisbury and High Point, and for the purposes of this competition the North Carolina Co. is taking current off petitioner's line (R., pp. 101, 123, 136, 137). The character of the competition so carried on is strikingly shown by an incident mentioned by Mr. Lee. He said that the Melton-Rhodes Co., which is located within a stone's throw of petitioner's substation at High Point, applied to it for power and was refused because petitioner could not spare it, and that thereupon the North Carolina Co. entered into a contract with the Melton-Rhodes Co. to supply it, and has since been doing so with current taken from petitioner's line (R., p. 123). He also said that petitioner was obliged to

refuse an application from the Southern Railway Co. to supply it with power out at Pomona, some distance from the city of Greensboro (R., p. 123), and Mr. Matthews testified that the North Carolina Co. is now serving the Southern Railway Co. at that point (R., p. 140). Mr. Lee further testified that the North Carolina Co. is increasing its load to such an extent that petitioner is forced to cut down some of its regular customers in the vicinity of Greensboro and High Point and elsewhere on its system (R., p. 123).

To say, therefore, that the North Carolina Co. is not in competition with petitioner in the general manufacture, sale and distribution of electric current and does not desire current from petitioner to sell in competition with it, is to totally misapprehend the testimony.

POINT II.

Petitioner has not dedicated its property to the manufacture and supply of electric current to other public utilities companies for purposes of re-sale by them.

Dedication is always a matter of intent, and "the facts and circumstances relied upon to prove the existence of an intent to dedicate on the part of the dedicator must be of a positive and unequivocal character." *Atlantic City* v. *Groff*, 68 N. J. L. 670, 672; *City of Camden* v. *Armstrong Cork Co.*, 210 Fed. 818, 820;

Irwin v. *Dixion,* 9 Howard 10, 30; *Coburn* v. *San Mateo County,* 75 Fed. 520.

Do the facts and circumstances proven in this case warrant the finding of an intent on the part of the petitioner to dedicate its property to the uses claimed by the respondents?

It is not claimed, as we understand, that petitioner's sale of electricity to municipalities, in part for public use and in part for re-sale to their inhabitants, shows such an intent. Manifestly it does not, as such municipalities are not on a plane with the public utilities companies in that they do not sell current at a profit, and their purchases of current for re-sale to their inhabitants is a part of their public functions. The distinction in this respect between a municipality and a public service corporation is pointed out in *Springfield Gas & Electric Co.* v. *City of Springfield,* 257 U. S. 66. Furthermore, under the laws of North Carolina, cities and towns have authority to operate municipal plants as well for the distribution of electric power and current to their inhabitants as for municipal use (Cons. Stats., N. C., Sec. 2832, *et seq.*). Petitioner, therefore, is under a duty to supply said cities and towns as a part of the consuming public. The majority opinion of the Circuit Court states that petitioner denies this obligation. This is an error. Petitioner has made no such denial, but admits its obligation in that respect, as shown by its application to the city of Greensboro for a franchise (R., pp. 8, 9), and by paragraph II of its second further answer to the complaint (R., p. 42).

Nor, we submit, can an intent to dedicate be inferred from the contracts entered into by petitioner with the predecessors of the North Carolina Co. These contracts will be found on pages 148 and 161 of the Record. They limit the quantity of current deliverable thereunder, the time the contracts are to run, the use to which the current may be applied, and specifically provide that on their termination petitioner may enter upon the property of the distributing company and remove its meters, apparatus, appliances, and other property therefrom.

That the High Point company at least did not understand that in making the contract with it petitioner was dedicating its property to the particular service in which that company was engaged, is apparent from the negotiations disclosed by the letters hereinbefore referred to. These letters show that the High Point company at first sought a contract for twenty years on the ground that it could not afford to change from its former system to petitioner's system for a shorter period; that it later came down to fifteen years, and finally accepted an agreement for ten years (R., pp. 154-161).

As to the contract with the Greensboro Co., this provides (Par. Eighth) that in consideration of the low rate at which power is to be delivered thereunder the Greensboro Co. will during the life of the contract keep its steam plant of 500 K. W. capacity at all times in readiness to be put in operation, and that the company will operate the same any afternoon between the

hours of four o'clock P. M. and seven o'clock P. M. upon notice from petitioner to furnish power either to itself or to petitioner, or that in case of accident or emergency it will put said steam plant in operation to supply its own demands or the demands of petitioner up to 500 K. W. capacity.

Further, the report of the North Carolina Co.'s engineer, heretofore referred to, furnishes potent evidence of the understanding of the North Carolina Co. that its rights against petitioner were of a contractual character and would terminate with the contract (R., p. 97).

It is true the complaint alleges that the cities of Greensboro and High Point, relying upon the North Carolina Co.'s right and ability to continue to obtain hydro-electric current from petitioner to be sold to its citizens desiring the same for light and power, heretofore entered into favorable contracts with the North Carolina Co. to purchase from it current for the lighting of their public streets, and other municipal purposes, and also granted to it franchises to occupy the streets of said cities, and invest the necessary capital in making and extending the desired accommodations for the growing demand of the people of both of said cities (Complt., Par. XXIX, R., p. 12).

The answer, however, denies that either the city of Greensboro or the city of High Point relied upon petitioner in granting its franchise to the North Carolina Co. or its predecessors, and points out that the franchise of each of said cities was granted to the prede-

cessors of the North Carolina Co. long before petitioner was chartered and came into existence. The answer further says that while, as defendant is informed, the city of High Point has recently entered into a contract with the North Carolina Co. for the wholesale purchase of power from said company to be retailed and distributed by the city, such contract was made after the North Carolina Co. had been notified by petitioner's letters of Jan. 8, 1920 (copies of which are annexed to the complaint), that petitioner would not, after Jan. 1, 1921, supply any electricity whatever to the North Carolina Co., and that it would be necessary for said company, within the period of twelve months stated in said letters, to equip itself to supply the needs and requirements of its own customers and of its business. The answer further points out that each of the contracts with the predecessors of the North Carolina Co. provides that all contracts made by them for the retailing of current shall be subject to said contracts with petitioner, and that the liability of petitioner for any purpose shall not be construed to extend to any other person or corporation than the vendee (Par. XXIX, R., p. 38).

It is needless to say that respondents offered no testimony in support of this allegation of their complaint.

Neither, we submit, do the contracts entered into with other public service corporations indicate an intent on the part of petitioner to dedicate its property to a service of the kind claimed by respondents. These

contracts are only four in number, as heretofore pointed out, and will be found on pages 255, 261, 266 and 275 of the Record. It will be found that they are along the same lines as those with the predecessors of the North Carolina Co. and as carefully limit the rights of the distributing companies thereunder and the periods within which such rights may be exercised. If petitioner had wished to negative any idea of an intent to dedicate its property to public use by these contracts, it is difficult to see how it could have done so more explicitly. Evidently the contracts, as well as those with the predecessors of the North Carolina Co., were entered into simply for the purpose of disposing of surplus current which otherwise would have gone to waste, and constituted no part of the current needed by petitioner to discharge its obligations to the consuming public (R., pp. 93-4). On the pages last referred to Mr. Lee points out that alternating current cannot be stored and that, unless a producing company can find someone on its system to take it, such company's investment suffers a loss. It is manifest that a producing company undertaking to supply the varying and growing needs of a community or series of communities must manufacture a surplus of current, or at least must maintain sufficient power for that purpose.

That a company so situate has a right to regard its surplus current as private property and to dispose of it by private contracts and does not by so doing incur additional obligations to the public and third persons,

is, we submit, shown by the decisions of this court in *Donovan* v. *Pennsylvania Company,* 199 U. S. 279.

In that case it was held that the Penna. Co. could legally grant to the Parmelee Transfer Co. the privilege of using its passenger station and depot grounds in the City of Chicago for the purpose of carrying on therefrom a transfer business for the accommodation of passengers arriving on its trains or on the trains of other railroads, and that such grant did not deprive it of the right to exclude from such station and grounds all hackmen or other expressmen coming to either for the purpose only of soliciting for themselves the custom or patronage of passengers.

The decision was put upon the ground that although the functions of a railroad company are public in their nature, such company holds the legal title to the property which it has undertaken to employ in the discharge of those functions; that, as an incident to ownership, it may use the property for the purpose of making a profit for itself, such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat these objects; that it is required, under all of the circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers, *but that it is under no obligation to refrain from using its property to the best advantage of the public and of itself; that it is not bound to so use its property that others, having no*

business with it, may make a profit to themselves; that its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation.

Adverting to one of the contentions of the defendants, which has a similarity to the contentions made by the respondents in the present case, the Court said:

> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that, as carriers of passengers, they are entitled to transact their business at any place which, under the authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. *The railroad company was not bound to afford this particular privilege to the defendants simply because they had afforded a like privilege to the Parmelee Transfer Company, for it had no contractual relations with the defendants, and owed them, as hackmen, no duty to aid them in their special calling.*" (Italics ours.)

Further, we submit, the contracts in question must be considered in the light of the decision of this Court in the *Express Company* cases reported in 117 U. S., page 1, and the decision of the North Carolina Supreme Court in *Atlantic Express Co.* v. *Wilmington & W. R.*

Co., reported in 111 N. C. 463; 16 S. E. 393, both of which decisions preceded the making of the first contract.

In the *Express Company* cases the complainants had entered into contracts with the defendant railroad companies under which they were given the right to carry on an express business on defendants' roads. The contracts were terminable on notice by either party and the railroad companies gave such notice. Complainants thereupon brought suit to restrain the railroad companies from interfering with the exercise of the privileges they had theretofore enjoyed under their contracts. The grounds were, first, that the railroad companies, being common carriers, owed the duty of rendering such service to the complainants as part of the public; and, second, that the railroad companies by entering into the contracts with complainants, and similar contracts with other express companies, had established a usage in favor of the public which complainants were entitled to avail themselves of. Complainants prevailed in the court below and the case came before this Court on appeal. In reversing the decree this Court, after stating the case, said (p. 26):

> "The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried,

just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freights are carried. * * *

"The constitutions and the laws of the States in which the roads are situated place the companies that own and operate them on the footing of common carriers, but there is nothing which in positive terms requires a railroad company to carry all express companies in the way that under some circumstances they may be able without inconvenience to carry one company. * * *

"Such being the case, the right of the express companies to a decree depends upon their showing the existence of a usage, having the force of law in the express business, which requires railroad companies to carry all express companies on their passenger trains as express carriers are usually carried. * * *

"In all these voluminous records there is not a syllable of evidence to show a usage for the carriage of express companies on the passenger trains of railroads unless specially contracted for. * * *

"The express companies that bring these suits are certainly in no situation to claim a usage in their favor on these particular roads, because their entry was originally under special contracts, and no other companies have ever been admitted except by agreement. By the terms of their contracts they agreed that all their contract rights on the roads should be terminated at the will of the railroad company. They were willing to begin and to expand their business upon this understanding, and with this uncertainty as to the duration of their privileges. The stoppage of their facilities

> was one of the risks they assumed when they accepted their contracts, and made their investments under them. If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented. As it is, we have only to decide whether these particular express companies must be carried notwithstanding the termination of their special contract rights."

In the *Atlantic Express Co.* case the Supreme Court of North Carolina accepted the decision of this Court in the *Express Company* cases as declaring the common law rule, and held that there was nothing in the statutes of North Carolina to the contrary, or which prevented the application of that rule to a similar situation arising there.

See also:

Oregon Short Line & U. N. Ry. Co. v. *Northern Pac. R. Co.*, 51 Fed. 465;

Little Rock & M. R. Co. v. *St. Louis S. W. Ry. Co.*, 63 Fed. 775.

How, in view of these decisions, can it be affirmed that when petitioner entered into the special contracts in question, under the circumstances above set out, it intended to dedicate, or did in fact dedicate, its property and franchises to the use of every other public utility in North Carolina that might find it profitable or convenient to ingraft itself upon them?

This leaves for consideration only the situation with respect to the Southern Public Utilities Co. As already pointed out, this company is in no sense an "independent vendor". As the opinion of the Circuit Court states, it is an offshoot of petitioner, controlled by it and with the same stockholders. The business of petitioner is large and diversified, and the Utilities Co. was evidently organized simply for the purpose of conducting a branch of it in certain localities where, because of the amount of detail involved, it was inconvenient for petitioner to carry it on directly. The business so carried on by the Utilities Co. is as much the business of petitioner as if it were carried on by petitioner in its own name. Petitioner controls it, and petitioner, or its stockholders, receive the profits.

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transactions involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, &c., Ry.* v. *Minn., &c., Asso.,* 247 U. S. 490.

What law prohibits a public service corporation from carrying on a portion or branch of its business through a subsidiary or other agency of its choice, or imputes to it, by reason thereof, an intention to open up its business and turn over its property to every rival on the same terms? As this Court said in the *Express Cases:*

> "So long as the public are served to their reasonable satisfaction, it is a matter of no import-

ance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public requires the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security" (117 U. S. 24).

In *Atchison, T. & S. Fe R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, it is said:

> "At common law a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond that he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. * * * And if he holds himself out as a carrier beyond the line so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would occupy if the means of transportation employed were all his own. *He certainly may select his own agencies and his own associates for doing his own work.*" (Italics ours.)

The organization and operation of the Utilities Co. would therefore seem to have no bearing on the question of dedication. Petitioner's sales to it are certainly not sales to an independent vendor.

The Circuit Court, however, apparently misapprehended the purposes and functions of this company and pictured it as an agency organized by petitioner and its stockholders for the purpose of distributing petitioner's current at retail in the State of North Carolina after petitioner had decided to abandon that branch of its business, and had definitely undertaken and entered upon the service of transmitting electric current to independent vendors thereof.

How unreal this picture is and upon what a mistaken view it is drawn, we have already pointed out.

This brings us back to the fundamental question of whether or not there was a dedication, and on this question we submit the proofs are all one way. As Judge Waddill well said:

> "If anything is manifest in this case as well from the pleadings and proofs as from the findings of the lower court it is that no such dedication has ever been or was intended to be made. On the contrary, appellee has at all times carefully in terms so contracted as to be relieved from the implication of any such folly."

POINT III.

The allegation, in paragraph XXXIII of the complaint, that petitioner enjoys a monopoly in the ownership of all hydro-electric sites accessible to Greensboro and High Point, is untrue in fact; and the allegation that it actually operates all developed hydro-electric plants accessible and available to these cities is irrelevant in law.

The Government reports show that there is undeveloped water power in North Carolina of about 1,095,000 horse-power, which is of course going to waste. Against this, petitioner has developed and is using only about 60,000 horse-power in that State. Petitioner's developments are all on the Catawba River, which is farther away from Greensboro and High Point than either the Yadkin or the Roanoke—rivers of North Carolina from one of which as much, and from the other much more, power could be developed than from the Catawba (R., pp. 97, 98).

The North Carolina Co. has the same right under its charter and the laws of North Carolina to develop water power, and to engage in the generation and distribution of electricity, as is possessed by petitioner. If it is lacking in capital, or wanting in courage, to make use of its charter powers to that end, these circumstances do not give it the right to shout "monopoly" or to appropriate to itself the property and franchises of petitioner. A man may not reap where he has not sown.

The North Carolina Co. possesses the power of eminent domain, but it cannot exercise this power for the condemnation, either directly or indirectly, of the property of another corporation likewise engaged in the public service. "Where there is no change in the use, there cannot be a change in ownership under the law of eminent domain."

Nor, we submit, does the fear, if it exists, that the North Carolina Co., if it should build a generating plant of its own, would be unable to compete successfully in a field so largely pre-empted by petitioner—"rich in resources and experience"—constitute an "important factor", or any factor whatever, in determining whether it is entitled to the relief which it seeks in this case.

It is not suggested that this richness in experience and resources was obtained illegally, or that petitioner has placed any obstacles in the way of the North Carolina Co. acquiring like experience and resources. Furthermore, petitioner's rates are within the control of the Public Service Commission of North Carolina and could not be reduced for the purpose of driving a competitor out of business. There would, therefore, seem to be no basis for the "deterrent fear" alluded to by the Court except the risk that is involved in any enterprise requiring ability, courage and the use of capital.

We submit that the North Carolina Co. is not entitled to ingraft itself upon petitioner or to demand a share in the profits of petitioner's successful venture into what was at the time a new field simply because no one else has yet succeeded in this field and the North Carolina Co. is afraid to enter it.

If the North Carolina Co. can appropriate the property and franchises of petitioner in this way, so can every other utility company in the State, and as Judge Waddill pertinently asked, "How long could any business withstand such a strain?"

The North Carolina Co. has frequently declared to the representatives of petitioner that it proposes to build a generating plant of its own, alleging that it could thus obtain current more cheaply than petitioner was willing to sell it (R., p. 95).

In 1916 it exhibited plans for building a hydro-electric plant at High Rock on the Yadkin River which its engineers advised would furnish it with all the current it needed for its own use and the use of its customers, and a surplus besides (R., p. 96). Nothing, however, came of these declarations. Probably they were made for mere trading purposes. Be that as it may, the North Carolina Co. cannot first blow hot and then blow cold. Nor can it, on failing to drive a satisfactory bargain with petitioner, set up as a right what it has heretofore enjoyed as a privilege. This would savor too much of an attempt by a tenant to deny the title of his landlord. In this respect the action of the North Carolina Co. is identical with that of the complainants in the *Express Company* cases and, we submit, merits the same fate.

POINT IV.

The North Carolina Co., in its capacity as a vendor of electricity, is not one of the public to whom petitioner owes the duty of service under its charter and the laws of North Carolina.

It is true that petitioner's charter gives it the right to buy or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations, and to use the same for the transmission of electric current for delivery to consumers on such lines, or for transmission of current to independent vendors thereof. The charter also gives petitioner the right to permit other individuals or corporations to string wires, or attach electric wires to any or all the poles so erected, owned or leased, and many additional powers (R., p. 252).

All these powers are plainly permissible, and the grant of them imposes no obligation on petitioner to employ them against its will. Nor do the laws of North Carolina impose any such obligation. Undoubtedly these laws do require service to the public, and on equal terms, but they nowhere define as one of the public a rival desiring service for the promotion of a competitive business.

In *Evansville & H. Traction Co.* v. *Henderson Bridge Co.*, 134 Fed. 973, the Court said:

> "While fully recognizing the well-known doctrine that public service corporations are bound to render to the public certain services appropriate to

the particular functions of the corporation, that doctrine has not been supposed to reach far enough to make the corporation serve the purpose or be subjected to the uses of a mere rival in business.

* * * * * *

The rival is not, ordinarily, to be included in the term 'general public.' "

In *Home Telephone Co.* v. *Sarcoxie Light & Tel. Co.*, 139 S. W. 108, the Supreme Court of Missouri said:

"It must be borne in mind that, as to business coming from the Bell Company to the Sarcoxie Company, the Bell Company is in the attitude of an individual, with no less or more rights. The individual in the town can compel the Sarcoxie Company, upon tender of proper charges, to extend its service by phone to his place of business or residence. The corporation has done the same thing, but no more. The individual cannot build a line of his own and demand physical connection; neither can the corporation. If the Bell Company at Sarcoxie demanded of the local Sarcoxie Company that it place a 'phone in its place of business, such would be within the rights guaranteed by the statute. If it went to the Sarcoxie Company and tendered the proper fee, and said it wanted to talk over their line, such would be within the statute; but if it demanded that a physical connection be made between the two lines, so that its customers could talk over the lines of the Sarcoxie Company, that is an entirely different question. With its customers the Bell Company is doing in a way a private business. This private business it cannot foist upon a competing line, save and except as an individual could go to such competing line and demand

service, In other words, one telephone company, without the consent of the other, cannot take charge of and use the instrumentalities of such other company by compelling physical connection therewith. The statute in question never so contemplated."

In *People on relation of Oneida Tel Co.* v. *Central N. Y. Tel. & Tel. Co.*, 41 N. Y. App. Div. 17, the relator sought the right to connect its lines with those of the defendant company and relied upon the statute of New York prohibiting one telephone company from discriminating against another. In denying the relief sought the Court said:

"It is foreign to the purpose of the act to permit another corporation, under pretence of using the line of its rival for purely private business, to use it to absorb the very business and profit to which it was intended simply to permit it to contribute upon the same footing as an individual.

Assuming that it is the duty of the defendant company to render the like service to the relator as to an individual, it is plain that the relator here seeks by mandamus to compel the defendant to render much more than the like service,—it seeks an inequality of advantage under pretense of equality. The difference is not merely in degree, but in substance and result."

See also:

Pacific Tel. & Tel. Co. v. *Anderson*, 196 Fed. 699, 703;

Central Stock Yards Co. v. *L. & N. R. R. Co.*, 192 U. S. 568;

L. & N. R. R. Co. v. *Central Stock Yards Co.*, 212 U. S. 132.

POINT V.

The fact that petitioner, as a public service corporation, is given the power of eminent domain by the laws of North Carolina and has exercised such power in the transaction of its business, has no bearing on the issues in this case.

If the question were whether petitioner is a public service corporation and, as such, owes a duty to the public whom it has undertaken or is required by law to serve, the fact that it has obtained and is exercising the power of eminent domain would be of the first importance. But as petitioner admits this relationship and the resulting liability, and the question is simply whether the North Carolina Co. is one of the public to whom it owes the duty of service, the fact that it possesses and exercises the power of emient domain is, we submit, of no account whatever.

We would suppose that this proposition is self-evident but for the repeated reference in the opinion of the Circuit Court to the obligation resulting from the petitioner's exercise of the power of eminent domain, and the implication at least that out of this arises the duty to serve all applicants, including those who wish current merely to sell again in competition with petitioner.

It is true the Court states that petitioner has exercised the power of eminent domain for the purpose of transmitting current to independent vendors thereof.

This, if correct, would be of account, but it is not correct. The evidence does not show that a single transmission line has been built by petitioner to any point or place for the purpose of supplying current to an independent vendor. The Court was apparently led into this error by supposing that the policy and aim of petitioner is to furnish current directly to manufacturers only through its own "independent vendor", the Southern Public Utilities Co., and that it is exercising its corporate powers mainly if not entirely for the wholesale manufacture and sale of hydro-electric current (R., p. 336).

If this supposition were well founded, the inference might be justified that petitioner has constructed and is using its transmission lines (assumed to have been constructed under its power of eminent domain) mainly if not entirely for the transmission of current to independent vendors thereof. That the supposition is not well founded we have already shown under Point I hereof, and the error into which the Court fell in this respect is fundamental and permeates and colors every part of its opinion.

Of course the current supplied by petitioner to the few independent vendors with which it has special contracts is transmitted to them over its own regular lines, but none of these lines appears to have been constructed for that particular purpose and all of them are used mainly, and most of them entirely, to supply the mills, factories, cities and other consumers to whom petitioner is furnishing current for light and power. These lines

are petitioner's private property although devoted primarily to the service of the public, and no law, we submit, prevents petitioner from using them to make a profit for itself so long as such use does not interfere with the public service (*Donovan* v. *Penna. Co., supra*).

To say that petitioner is exercising its power of eminent domain when it furnishes this particular service, and that therefore the service is public in character, although rendered under special contracts, is the same as to say that a railroad company is exercising its power of eminent domain when it makes a special contract with an express company for service on its line, and that therefore such service is public in character and must be rendered to all alike; or as to say that because a railroad company acquires its station and depot grounds by the exercise of its power of eminent domain it cannot make special contract with a transfer company for the use of such station and grounds without thereby obligating itself to extend similar privileges to all hackmen and expressmen who desire the privilege.

The power of eminent domain, we submit, was conferred by law upon petitioner for the benefit of the consuming public, not for the benefit of the North Carolina Co. and other companies engaged in a similar business.

POINT VI.

The decision of the Circuit Court of Appeals operates to deprive petitioner of its property without just compensation and without due process of law; deprives it of its freedom of contract and denies to it the equal protection of the laws, contrary to the fifth and fourteenth amendments of the constitution of the United States.

1. The decision by requiring petitioner, against its will, to sell its electricity to another public service company for resale and distribution by such company, compels petitioner to devote its property to a use to which it has not been dedicated, and thereby deprives it of its property without compensation and without due process of law.

Northern P. R. Co. v. *North Dakota,* 236 U. S. 585, 595;

Louisville & N. R. Co. v. *West Coast Naval Stores Co.,* 198 U. S. 483, 495;

Weems S. B. Co. v. *People's S. B. Co.,* 214 U. S. 345, 357.

2. The decision not only confers upon the North Carolina Co. the right to take petitioner's electricity against its will for the purpose of reselling and distributing it throughout a large part of the territory in which petitioner does business, to the exclusion of the petitioner's asserted right, itself, to sell and distribute

such electricity to the consumers thereof, but in its effect and results confers a similar right upon every other distributing company, now existing or hereafter created and thereby deprives petitioner of its property without due process of law.

L. & N. R. R. Co. v. *Central Stock Yards Co.*, 212 U. S. 132, 144.

3. The decision deprives petitioner of its right to distribute its electricity to the public through its own instrumentalities, or through instrumentalities of its own selection, and thereby deprives it of its property and of its freedom of contract without due process of law.

Atchison T. & S. Fe. R. R. Co. v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667, 680;

Memphis & Little Rock R. R. Co. v. *Southern Express Company*, 117 U. S. 1.

POINT VII.

The decision of the Circuit Court of Appeals is erroneous both on the law and the facts and we respectfully submit that it should be reversed and the decision of the District Court affirmed.

Dated, September 24, 1923.

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